a public place, their seller could not be criminally liable. But in my view here the facts are quite different. Some of the objects used as prizes on these tikam boards displayed quite openly money ranging from 5 cent coins to dollar notes. They were obviously meant to entice gullible members of the public. They had not been sold to a father who wanted to use them at a children's party where his young guests would be invited to have a free lucky dip. They had been sold to PW6 who had a stall in a public place in a sizeable town. Similar boards had been sold to other shopkeepers. PW6 certainly allowed members of the public to try their luck. In these circumstances it is quite clear to me that the accused had assisted in carrying on this public lottery, it being immaterial who actually carried on the public lottery.

For these reasons I set aside the order acquitting and discharging the accused and for it I substitute an order finding him guilty and convicting him of the offence charged.

As to sentence, I fine the accused $500. On his application I allow him to pay $100 today, the rest in monthly instalments of $100, payable as to the first instalment on 1st December, 1962 and as to the rest on the 1st of each subsequent month. The exhibits are confiscated.

Acquittal and discharge set aside.

Solicitors: *Pillai, Lim, Lee & Hwang.*

INNAYA & ANOR. v. LOMBARD ACCEPTANCE (MALAYA) LTD.

[A. C. J. (Hepworth J.) November 30, 1962]

[Penang — Civil Appeal No. 5 of 1962]

Hire-Purchase — Car in possession of third party — Re-possession by owner on default of instalments — More than 1/3rd of hire-purchase price paid — Application of English Hire-Purchase Act, 1938 — Whether re-possession wrongful — Hire-Purchase Act, 1938, ss.11, 21 — Civil Law Ordinance, 1956, ss.3, 5.

Practice and Procedure — Ground of appeal not pleaded in court below — Whether ground open on appeal.

The 1st appellant was the hirer of a motor-car from the owner, the respondents, under a hire-purchase agreement and under which the 2nd appellant was the guarantor. After seven monthly instalments had been paid, the 1st appellant defaulted in payment. The respondents repossessed the car which had been sent for repairs, after paying the repairer the costs of the repairs. The respondents then brought an action for the recovery of $1,642.79 being the sum outstanding under the hire-purchase agreement.

In this appeal the appellants contended that by virtue of sections 3 and 5 of the Civil Law Ordinance, 1956, the English Hire-Purchase Act, 1938 applied here and that the re-possession was wrongful as being in contravention of section 11 of the Act because more than one-third of the amount of the hire-purchase price had been paid by the appellants and that therefore the respondents had no right to recover any sum of money in addition.

Held: (1) this ground of appeal was not pleaded and accordingly was not open to the appellants;

(2) even if the English Hire-Purchase Act applied, section 11 of the said Act has no application when the goods are in the hands of a third party at the time of seizure.

Case referred to:—

(1) *Cooden Engineering Co. Ltd.* v. *Stamford* [1952] 2 All E.R., 915.

CIVIL APPEAL.

Jag-Jit Singh for the appellants.

K. E. Hilborne (*Khoo Keat Siew*) with him for the respondents.

Cur. Adv. Vult.

Hepworth J.: This is an appeal from a judgment of the learned President, Sessions Court, Penang, awarding the plaintiffs/respondents the sum of $1,211.79 and costs and dismissing the defendants/appellants' counterclaim.

Briefly what had happened was this. The 1st appellant was the hirer of a motor car from the owners, the respondents, under a hire-purchase agreement under which the 2nd appellant was the guarantor. The hire-purchase agreement had been entered into on the 1st October, 1959, and 7 monthly instalments had been paid by August, 1960, by which time there were 3 instalments in arrear. In August, 1960, the 1st appellant arranged with a garage in Alor Star, Lean Kooi Motors, to carry out certain repairs to this car, the cost of which amounted to $351.59. The car was in this garage for a month and the 1st appellant did nothing about collecting it or paying the repair charges due. The respondents learned that the car was in this garage and re-possessed the car after paying the garage the cost of the repairs.

The respondents then claimed the sum of $1,642.79, which was the amount they alleged to be outstanding and due under the hire-purchase agreement.

The learned President held that the transaction was a hire-purchase transaction and that the document concerned, P.5, was a hire-purchase agreement. I see no reason to disagree with him as to this and accordingly, although a number of points were argued both in the Court below and on appeal, the only ground of appeal of substance was that the transaction was governed by English law and that as a result, as the respondents had retaken the car, they had no right to recover any sum of money in addition.

The appellants' argument was that the hire-purchase agreement provided that if more than one-third of the hire-purchase price had been paid by the hirer, then unless the hirer had himself put an end to the agreement, the owner could not take the car back from the hirer without the consent of the hirer unless the owner obtained an order of the Court. Those provisions were however only to take effect if required by law and otherwise were to be void.

The appellants argue that by virtue of the Civil Law Ordinance, 1956, section 3(1) and (2) and section 5(1), the Hire-Purchase Act, 1938, of

the United Kingdom is applicable here. Section 11 of the Hire-Purchase Act, 1938, reads as follows:—

"11. *Restriction of owner's right to recover possession of goods otherwise than by action.* — (1) Where goods have been let under a hire-purchase agreement and one-third of the hire-purchase price has been paid, whether in pursuance of a judgment or otherwise, or tendered by or on behalf of the hirer or any guarantor, the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by action.

(2) If an owner recovers possession of goods in contravention of the foregoing subsection, the hire-purchase agreement, if not previously determined, shall determine, and —

(a) the hirer shall be released from all liability under the agreement and shall be entitled to recover from the owner in an action for money had and received all sums paid by the hirer under the agreement or under any security given by him in respect thereof, and

(b) any guarantor shall be entitled to recover from the owner in an action for money had and received all sums paid by him under the contract of guarantee or under any security given by him in respect thereof.

(3) The provisions of this section shall not apply in any case in which the hirer has determined the agreement or the bailment by virtue of any right vested in him."

As more than one-third of the amount of the hire-purchase price had been paid by the appellants the seizure of the vehicle by the respondents was wrongful and contrary to the provisions of the agreement and of the Act and accordingly the respondents were not entitled to recover in addition to the vehicle the amount in cash which was outstanding under the agreement.

The respondents submit that there are two answers to this. The first is that this point was not pleaded. Paragraph 26 of the defence of the 1st appellant reads as follows:—

"26. The 1st defendant, therefore, suffered damage as a result of the breach of the said agreement and/or as a result of the wrongful seizure by the plaintiffs of the 1st defendant's said motor car."

This is the only place where wrongful seizure is pleaded. In paragraphs 20, 21, 22, 23, 24 and 25 of her defence the 1st appellant pleaded *non est factum*, it was a moneylending transaction, the agreement was a bill of sale, it was an unconscionable bargain, the respondents had consented to breaches of the agreement by the 1st appellant, and estoppel, any of which would make the seizure wrongful, and the respondents contend that paragraph 26 had reference to these pleas and had no reference to and did not state that the English Act applied and that by virtue of more than one-third of the hire-purchase price having been paid the seizure was wrongful. The respondents urge that if paragraph 26 of the defence of the 1st appellant was drafted with the provisions of the Hire-Purchase Act, 1938, in mind, then they would have counterclaimed for money had and received. As regards the 2nd appellant there was no reference anywhere in his defence to wrongful seizure.

The second argument the respondents put forward is that even if the Hire-Purchase Act, 1938, does apply section 11 does not apply where the car is in the hands of a third party when it is seized. Nothing in section 11(2) restricts the owner's rights of recaption against third parties into whose hands the goods may pass. In considering whether a person is a third party regard must be had to the definition of a hirer in section 21(1) of the Act (*Goode's* Hire-Purchase Law and Practice, page 170). It is submitted by the respondents that the garage repairer was a third party and not a hirer.

It was accordingly the respondents' argument, firstly, that this ground of appeal was not open to the appellants because they had not pleaded it, and secondly, even if it was held that they had pleaded it and that the United Kingdom Act did apply nonetheless as the vehicle was repossessed from a third party the provisions of section 11 of the Hire-Purchase Act, 1938, did not apply. They were entitled to re-possess the car from Lean Kooi Motors by virtue of the breach of the provisions of clause 5(vii) of the hire-purchase agreement which resulted in the agreement and the hiring thereby constituted being forthwith and for all purposes determined.

In my opinion this point was not pleaded and accordingly this ground of appeal is not open to the appellants. But even if I am wrong in this I do not think there is any doubt that whether or not the English Act applies, and I find it unnecessary to decide this point, the provisions of section 11 of the Act do not apply when the goods are in the hands of a third party, in this case Lean Kooi Motors were a third party, and the breach of the provisions of clause 5(vii) of the hire-purchase agreement entitled the respondents to re-possess the vehicle, quite apart from the fact that there were 3 monthly instalments in arrear.

In the agreement in this case clause 6 is a minimum payment clause whereby the hirer binds himself to pay to the owners a sum of money in the event of the agreement coming to an end before it has run its full course. The money or part of it is expressed to be payable by way of compensation for the depreciation of the vehicle. Nowhere in the agreement can I find provision for the payment of the whole of the balance outstanding under the agreement in the event of the owners having re-possessed the vehicle. The respondents nonetheless claimed the whole of the balance outstanding on the hire-purchase agreement plus the cost of the repairs and re-possession charges.

The case of *Cooden Engineering Co. Ltd.* v. *Stamford* [1] is authority for saying that where a minimum payment clause is relied on, at any rate if it is of a similar character to the clauses in that case, the Court will look to the event which prompted the determination of the agreement and if it be a breach of the agreement by the hirer then the Court will decide whether the sum claimed is penal in amount. In that case

it was the total of the instalments outstanding at the date of determination which was claimed and the whole Court were agreed that it was penal in amount.

The point, however, has not been taken here or in the Court below so that the question of whether the sum claimed by the respondents may be in the nature of a penalty does not arise.

This appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Jag-Jit Singh; Hogan, Adams & Allan.*

Re ARBITRATION BETWEEN MOHAMED IBRAHIM & KOSHI MOHAMED

[C. A. (Rose C.J., Buttrose and Wee Chong Jin JJ.) October 25, 1962]

[Singapore — Civil Appeal No. 9 of 1962]

Arbitration — Interim "Order" of arbitrator — Whether "award" — Test to be applied.

Practice and Procedure — Application for enforcement of arbitration award — Whether by originating summons or motion.

"Award" is not a term of art; and the test as to whether an award has been made must depend upon whether the order in question amounts to a decision. The principle is "any form of words amounting to a decision of the questions referred will be good as an award. No technical expressions are necessary." *Russell* on Arbitration, 16th ed., p. 224 adopted.

COURT OF APPEAL.

L. A. J. Smith for the appellant.

H. A. Francis for the respondent.

Cur. Adv. Vult.

Rose C.J.: This is an appeal against a judgment allowing an application to enforce an award made by an arbitrator.

The arbitrator was appointed in pursuance of an arbitration agreement between Mohamed Ibrahim, the respondent in the present appeal, and one M. A. Koshi Mohamed. The award in question was made on the 25th September, 1961 and on the 7th of October, 1961 the said M. A. Koshi Mohamed died. By an order of Court made on the 4th of December, 1961 his widow was made a party to these proceedings.

The application to enforce the award was made by originating summons and at one stage in the proceedings it was contended that this procedure was wrong and that the application should have been made by motion. This point, however, was not pressed before this Court on appeal. I would observe that I see no reason to believe that the learned trial Judge was wrong in holding that an application for the enforcement of an award under the Arbitration Ordinance can properly be made by originating summons.

The point taken on appeal was that the order made on the 25th of September, 1961 was not really an award at all and that therefore no application for its enforcement could be entertained.

It is therefore necessary to consider the history of the matter.

Mr. A. P. Rajah, an advocate and solicitor, was appointed to act as arbitrator on the 2nd of September, 1960 to determine matters of dispute arising in connection with the partnership agreement between the respondent and the said M. A. Koshi Mohamed. A preliminary meeting was held on the 14th of October, 1960 and the first hearing took place on the 1st of August, 1961 when certain interim orders were made by consent.

A further hearing was held on the 16th of September, 1961, when learned counsel who was at that time appearing for the appellant asked for and obtained an adjournment to the 25th of September. On the 25th of September the arbitrator made the following order:—

"I ORDER that the business at the close of today's showing be handed over by the 1st partner to the 2nd partner (the 2nd partner becoming the sole proprietor of the business as from the end of to-day's showings).

Accounts have been rendered by the 1st partner up till 31st July, 1961. He has been running the business from 1st August, 1961 to 25th September, 1961 (both days inclusive). Mr. Francis asks that accounts for this period be filed before the next hearing at least one week before the hearing. Mr. Goho agrees.

My consent hearing fixed for 26th and 27th October, 1961. The accounts for period 1st August, 1961 to 25th September, 1961 to be filed on or before 19th October, 1961.

Falsifications and surcharges to be put in before the 26th October, 1961.

The issues raised in the 2 statements of the 1st and 2nd partners will be dealt with. Then the accounts will be gone into."

It is true that the arbitrator described his decision as an order and not an award but when cross-examined by learned counsel for the respondent in this Court he said: "I made an order and I intended it to be binding on the parties."

"Award" is not a term of art; and it seems to me that the test as to whether an award, be it final or interim, has been made must depend upon whether the order in question amounts to a decision. The principle is stated in the 16th edition of *Mr. Russell's* book on Arbitration at page 224: "any form of words amounting to a decision of the questions referred will be good as an award. No technical expressions are necessary."

It seems to me that the order of the 25th of September does amount to a decision of some of the questions referred and that, although the order is of an interim nature, it nonetheless should be regarded as an "award".

For these reasons I am of opinion that the appeal fails and must be dismissed with costs.

Buttrose and Wee Chong Jin JJ. concurred.

Appeal dismissed.

Solicitors: *L. A. J. Smith; Francis & Co.*